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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SURIAL DIAZ, Defendant and Appellant.	A153196 (Contra Costa County Super. Ct. No. 05-160704-3)

A jury convicted defendant of four counts of forcible lewd acts on a minor and found true one special allegation of substantial sexual conduct. He contends (1) the trial court committed reversible error by excluding evidence his victim had previously made a false accusation of being molested; (2) his sentence must be vacated because the evidence was insufficient to support a finding the offenses on which he was convicted occurred on separate occasions and a jury, not a judge, should have made that determination; and (3) the abstract of judgment fails to reflect conduct credits awarded at sentencing. We agree the abstract of judgment must be corrected and otherwise affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

We include only those facts necessary to the determination of the issues on appeal.

Jane Doe 1 and Jane Doe 2 are sisters. In 2004, they went to live in their paternal grandmother's (grandmother) house after their parents "split up." Defendant was married to grandmother and lived with her in the same house when the sisters lived there. It is apparently undisputed that at all relevant times, Jane Does 1 and 2 would have preferred to live with their mother.

On June 14, 2017, the Contra Costa County District Attorney filed a first amended information charging defendant with five counts of committing a forcible lewd act against Jane Doe 2 when she was under the age of 14 (Pen. Code,[1] § 288, subd. (b)(1); counts 1–5); two counts of committing a forcible lewd act against Jane Doe 1 when she was under the age of 14 (§ 288, subd. (b)(1); counts 6–7); and two counts of committing a lewd act against Jane Doe 1 when she was 14 years old (§ 288, subd. (c)(1); counts 8–9). The information further alleged defendant committed most of his offenses against more than one victim. (§ 667.61, subd. (j)(2).)

At trial, Jane Doe 2 testified she had been touched by defendant on either her breasts or vagina on around 10 different days when she was about 12 years old. Jane Doe 2 testified the touching happened in the grandparents' bedroom, and it would happen when she was sick or had gone into the bedroom because she had a nightmare.[2] She explained defendant touched her on her breasts on "maybe like ten or more" different days and on her vagina "[m]ore than five" days, and the touching got worse over time. As to her breasts, defendant would "touch outside the shirt and sometimes like go underneath the shirt," doing so "[m]aybe five times or more." When Jane Doe 2 "first started growing pubic hair, he would like touch [her] down there and then like talk about it, and how [she] was becoming a lady and all that." Defendant touched her pubic hair but not actually her vagina "[m]aybe like two or three" times, and he touched her vagina but did not actually put his fingers inside "[m]aybe like two or three" times. "[L]ater on when [Jane Doe 2] actually had more pubic hair, . . . he would actually touch . . . the clit area, and then go even further to where he was touching the actual hole and putting his finger in." Jane Doe 2 testified defendant "would like roll over and put his leg on [her]. And that's when [she] could feel his private parts against [her]." His leg put a lot of pressure on her, and made her feel "trapped because he's so heavy." On one occasion when defendant digitally penetrated Jane Doe 2, he said "he would put his penis inside

[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Jane Doe 2 shared a different bedroom with her sister, Jane Doe 1, and a cousin.

[her] but it was too big for" her. Defendant also made sexual comments to Jane Doe 2 when he saw her outside the shower in her towel.

On July 19, 2017, the jury found defendant guilty of four of the five charged offenses as to Jane Doe 2,[3] was unable to reach a verdict on one charge (count 2—digital penetration) as to Jane Doe 2, and acquitted defendant of the three remaining charges as to Jane Doe 1.[4] The jury found not true the multiple victim special allegations.

The trial court sentenced defendant to 34 years in prison by imposing full consecutive terms for each of the offenses of the conviction. Defendant timely appealed.

II. DISCUSSION

A. *Prior False Accusation*

Defendant contends the trial court reversibly erred when it prevented him from impeaching Jane Doe 2 by introducing evidence she had made a prior false allegation of molestation against a different man. Specifically, he contends the trial court abused its discretion under Evidence Code section 352, violated his constitutional right to cross-examine Jane Doe 2, and denied him his due process right to present a defense. For reasons we will explain, we reject each of these claims.

Before trial, the prosecution moved in limine to preclude defendant from introducing evidence regarding an allegedly false allegation Jane Doe 2 made when she was four years old that she had been molested. During the preliminary hearing, defense counsel had asked Jane Doe 2 whether she had falsely accused someone else of touching her prior to the incidents with defendant. Jane Doe 2 explained "[s]omeone touched [her] before, and [she] told the cops," but the person she initially identified was not the right person because she "was little and couldn't do face-to-face recognition." She testified she did not know she picked the wrong person, and it might or might not have been the right person. On redirect, she confirmed she had been molested when she was "[a]round

[3] As to count 1, the jury found true a special allegation that defendant had substantial sexual conduct with Jane Doe 2.

[4] At the close of evidence, the court granted the prosecutor's motion to dismiss one of the section 288, subdivision (c)(1) counts as to Jane Doe 1 (count 9).

two or three" years old, she did her best to tell the police who did it, but she "remember[ed] seeing a book of just guys and having to look through it to see who it was. [¶] . . . [¶] [She] just chose someone that looked like him." Jane Doe 2 confirmed she was not saying she lied when she said someone did something to her, only that she was not positive she identified the right person.

At the hearing on the motion in limine, defense counsel stated he had spoken to the "person that was accused" by Jane Doe 2, and he "did deny the allegations" and "was not arrested or charged in that matter." Defense counsel represented he would have that individual testify and deny the abuse happened, and argued such evidence was relevant to Jane Doe 2's credibility. The trial court granted the motion in limine and excluded the evidence under Evidence Code section 352. It explained the value of the impeachment evidence "depends only" on "proof that the prior charges were false" Further, the court noted, the "jury would be mandated to conduct a mini-trial" based on "this four-year-old's accusations" regarding "an allegedly false long-past sexual incident which never reached the point of formal charges." The issue was revisited in defendant's motion for a new trial. The trial court denied the defense motion, noting the "facts in this case [did not] even rise to a false accusation," the accused's denial the abuse occurred may be "merely self-serving," and that Jane Doe 2 was "a two- or three-year-old child, certainly almost pre-verbal, very difficult to determine and pursue something such as that, much less even an ability for her to have communicated at that time."

A trial court "has broad discretion under Evidence Code section 352 'to exclude even relevant evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." ' " (*People v. Merriman* (2014) 60 Cal.4th 1, 60; *People v. Gurule* (2002) 28 Cal.4th 557, 619 [trial courts have broad discretion to admit or exclude evidence offered for impeachment on a collateral matter].) "An appellate court reviews a court's rulings regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion. [Citation.] We will not reverse a court's ruling on such matters unless it is shown ' "the trial court exercised its discretion

in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*Merriman*, at p. 74.) For several reasons, we conclude the trial court did not abuse its discretion here.

First, a prior false accusation of sexual abuse is admissible to challenge a victim's credibility, but such evidence may be appropriately excluded under Evidence Code section 352 if it is not first *established* the prior accusation was false. (*People v. Winbush* (2017) 2 Cal.5th 402, 469 [prior accusation of rape is relevant to complaining witness's credibility "only if the accusation is shown to be false"]; *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457.) In other words, where "conclusive evidence" of falsity is lacking, a trial court may exclude the evidence. (*Tidwell*, at p. 1458; *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1424 ["Prior rape complaints do not reflect on credibility unless proven to be false."].) Here, Jane Doe 2 did not admit her prior accusation was false—she affirmed the molestation happened but said she may have misidentified the person who did it because she was only four years old at the time and could not "do face-to-face recognition." The only evidence offered to prove the accusation false was the alleged perpetrator's testimony he did not do it. As the trial court suggested, that "self-serving" testimony is hardly conclusive on the issue of whether the abuse occurred.[5]

Second, the trial court apparently excluded the evidence in part due to the remoteness of the allegations and Jane Doe 2's young age at the time of the prior

[5] Defendant claims the trial court inappropriately made a credibility determination in stating the testimony of the person accused of abuse would be "self-serving." To the contrary, in ruling on defendant's motion for new trial, the court did not suggest it disbelieved testimony it had not even heard. We understand the court's comment to mean the only evidence on this disputed issue pitted the credibility of the accused molester against that of the alleged victim in a classic "he said, she said" evidentiary dispute. It seems obvious such testimony is not "conclusive proof" the accusation was false. (See, e.g., *People v. Bothuel* (1988) 205 Cal.App.3d 581, 594–595 [uncle's "self-serving testimony that he did not molest [niece] was hardly compelling evidence of that fact" and trial court could reasonably conclude under Evid. Code, § 352 that "battle over subsidiary issue of whether the uncle had molested [niece]" would distract the jury, consume time, and create confusion], overruled on other grounds in *People v. Scott* (1994) 9 Cal.4th 331, 347–348.)

accusation. Specifically, the trial court relied on several cases involving "an attempt by the defense to bring in an allegedly false *long-past* sexual incident which never reached the point of formal charges." (Italics added.) The court observed: "The notion that this would be accurate is highly questionable. Again, it brings into play the idea that the jury would be mandated to conduct a mini-trial, and that this four-year-old's accusations, which sadly could very well be true, just because it wasn't prosecuted is suspect." Defendant argues Jane Doe 2 was four years old at the time she made the accusation and thus had "sufficient ability to communicate to make the allegation, to identify a perpetrator, and to have her allegation taken seriously." That may be true. But the trial court could also reasonably conclude Jane Doe 2's prior allegation, made 13 years before trial, when she was four years old, about an event that allegedly happened when she was two, was of limited probative value and unlikely to reflect accurately on her credibility at the time of trial, when she was 17. We strongly disagree this was "an improper factor" for the court to consider in deciding whether to admit the evidence. (See, e.g., *People v. Bittaker* (1989) 48 Cal.3d 1046, 1097 [exclusion of impeachment evidence of "two long-past sexual incidents" was appropriate], disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919.)

Third, because there was no conclusive evidence the prior accusation was false, allowing the defense to present evidence on this issue would likely result in a trial within a trial, confusing the jury and consuming undue time with collateral matters not probative of the issues the jury was being asked to decide. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1089–1090 ["Under Evidence Code section 352, a trial court has 'broad power to control the presentation of proposed impeachment evidence " ' "to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." ' " ' "].) Under these circumstances, the trial court's ruling was not an abuse of discretion.

We also reject defendant's argument the trial court's ruling deprived him of his federal due process right to present a defense and his constitutional right to confront and cross-examine witnesses. "As a general matter, the ordinary rules of evidence do not

impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal.3d 826, 834; *People v. Gurule, supra,* 28 Cal.4th at p. 620.) Moreover, the confrontation clause does not "prevent[] a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679; *People v. Sánchez* (2016) 63 Cal.4th 411, 450 ["not every restriction on a defendant's cross-examination violates the Constitution"].) " '[R]eliance on Evidence Code section 352 to exclude evidence of marginal impeachment value . . . generally does not contravene a defendant's constitutional rights to confrontation and cross-examination.' " (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 122, disapproved on other grounds in *People v. Dalton* (2019) 7 Cal.5th 166, 214.) Here, given the remoteness of the allegation, Jane Doe 2's young age at the time, and the absence of conclusive evidence the allegation was false, the trial court's exclusion of the alleged false allegation evidence did not violate defendant's constitutional rights. Further, defendant had ample opportunity to probe Jane Doe 2's credibility, specifically arguing to the jury Jane Doe 2 was motivated to lie because she wanted to live with her mother, not her grandparents, was influenced by her older sister's similar abuse allegations, and was not credible based on alleged inconsistencies in her testimony. (See *Ardoin*, at p. 121 [no violation of confrontation clause where defense had "both the opportunity and the evidentiary substance to thoroughly challenge [witness's] credibility without the excluded evidence"].)

B. *Sufficiency of Evidence of Separate Offenses*

Defendant next contends insufficient evidence supported the trial court's finding the offenses on which the jury returned guilty verdicts happened on separate occasions. We disagree. Defendant acknowledges it is the sentencing judge who makes this determination. (§ 667.6, subd. (d); Cal. Rules of Court, rule 4.426 [under § 667.6, the trial court determines whether crimes involved separate victims or same victim on separate occasions].) Defendant fails to set forth a summary of the evidence showing

why it is insufficient to support a finding the crimes occurred on separate occasions.[6] Accordingly, he has forfeited this argument. In any event, Jane Doe 2 testified defendant touched her breasts on 10 or more different days, and her vagina on 5 or more different days. (See *People v. Garza* (2003) 107 Cal.App.4th 1081, 1092 [appellate court will reverse trial court's finding defendant committed offenses on separate occasions under § 667.6 only if "no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior"].) The trial court did not err in imposing consecutive sentences here.

C. *Consecutive vs. Concurrent Sentencing*

Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Alleyne v. United States* (2013) 570 U.S. 99, defendant argues the trial court violated his constitutional right to a jury trial by sentencing him to full consecutive sentences under section 667.6, subdivision (d) without a jury finding he committed the underlying offenses on separate occasions. Defendant argues this is because mandatory full consecutive sentencing "has the effect of increasing both the minimum and the maximum sentences" for his offenses.

Defendant's argument fails because "the United States and California Supreme Courts have held that the decision whether to run individual sentences consecutively or concurrently does not implicate the Sixth Amendment right to jury trial." (*People v. King* (2010) 183 Cal.App.4th 1281, 1324, citing *Oregon v. Ice* (2009) 555 U.S. 160, 162–165 and *People v. Black* (2007) 41 Cal.4th 799, 820–823; *People v. Scott* (2015) 61 Cal.4th 363, 405 [imposition of consecutive sentences did not violate 6th Amend. right to jury trial]; *People v. Wilson* (2008) 44 Cal.4th 758, 809, 813 [trial court did not violate defendant's 6th Amend. rights by imposing full consecutive terms under § 667.6, subd. (d)].)

[6] Indeed, defendant apparently concedes the evidence would be sufficient to support a finding the offenses occurred on separate occasions if that finding were made by the jury, which defeats his insufficiency of the evidence claim.

D. *Credits*

Both parties agree defendant is entitled to additional conduct credits not reflected on the abstract of judgment. At sentencing, the trial court stated defendant had 106 actual credits and 16 conduct credits under section 667.5, subdivision (c). The abstract of judgment reflects only 106 actual credits. We agree with the parties the abstract must be corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court may order correction of clerical errors in abstract of judgment].)

III. DISPOSITION

The superior court is directed to prepare an amended abstract of judgment reflecting a total of 122 credits, including 106 actual days and 16 conduct days. A certified copy of the amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. The judgment is affirmed.

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Margulies, J.

We concur:

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Humes, P. J.

_____
Banke, J.

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